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In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ERIE RESISTOR CORPORATION AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit entered in this case.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. 17-26) is not yet reported. The findings of fact, conclusions of law and order of the Board (R. 3a-32a) [1] are reported at 132 NLRB No. 51.

[1] "R." refers to the portion of the record printed as the joint appendix to the briefs in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962 (Appendix B, *infra*, pp. 27-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether it is an unfair labor practice in violation of Section 8(a)(1) and (3) of the National Labor Relations Act for an employer to discriminate between employees who strike and employees who work during a strike by awarding an additional arbitrary seniority credit—in this case 20 years—to replacements for strikers and also to strikers who return to work during the strike, with resulting discrimination, during a subsequent layoff, against strikers who did not return to work until after the strike's termination.[2]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C, *infra*, pp. 29-30.

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[2] The decision of the court of appeals denying enforcement of the Board's order presents the further question whether the Company refused to bargain, in violation of Section 8(a)(5) of the Act, by insisting that this or a similar form of superseniority policy be made a part of any collective bargaining agreement. See footnote [redacted], *infra*, p. [redacted].

STATEMENT

I. The Board's Findings of Fact

Early in 1959 the Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO met to negotiate the terms of a new contract, to become effective on March 31, the expiration date of the then current contract (R. 37a-38a; 73a-75a, 213a-232a).[3] The parties were unable to reach agreement and on March 31, 1959, the Union called a strike in support of its contract demands, which was joined by all of the approximately 478 employees working in the unit (R. 4a; 69a-70a, 145a).[4]

Throughout April, the month following the strike, the Company maintained production at approximately 15 to 30 percent of normal by transferring 140 clerical and other non-unit employees to production jobs (R. 4a; 409a-410a, 429a-430a, 451a, 522a). Although the Company had received applications for employment as early as a week or two after the strike began, it did not attempt until the next month to fill the production unit with employees from outside the plant (R. 4a; 393a-394a). On May 3, the Company notified all members of the Union by letter that it intended to begin hiring replacements and that strikers would retain their jobs only until replaced (R. 4a; 230a, 560a-

[3] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] In addition to the approximately 478 employees who went on strike, 450 employees in the unit were in layoff status (R. 5a, n. 69a-70a).

561a). In accordance with this notice the Company began to hire replacements during the week of May 11, assuring the new employees, after they were accepted for employment, that they would not be discharged or laid off upon settlement of the strike (R. 4a; 174a, 367a).

In a bargaining session held on May 11, the Company told the Union that it was promising replacements job security and that it intended to implement this promise by according them some form of superseniority (R. 4a; 120a, 200a-202a).[5] At five bargaining sessions held between May 11 and May 28, the Company proposed several alternative forms of super-seniority, offering to negotiate the precise nature of the seniority benefit to be accorded replacements but stating that superseniority in some form was "something that management people want and must have" (R. 4a, 21a; 120a, 200a-203a).[6] The Union opposed the Company's various seniority proposals, contending that no matter what particular form superseniority might take it would necessarily work an illegal discrimination against the strikers (R. 4a; 224a). As significant progress was made in the negotiations on other issues, superseniority became the focal point of disagreement (R. 21a; 219a-222a, 356a).

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[5] When the strike started, a male employee needed seven years seniority to avoid layoff; a female employee, nine years (R. 5a, n. 2; 70a).

[6] At this time the city of Erie was classified by the United States Department of Labor as an area of severe unemployment; at least 12 percent of the total labor force was unemployed (R. 6a, n. 3; 188a-189a, 587a).

By May 25, the Company had recalled 32 of the employees in layoff status, hired 1 new employee, and put 4 returning strikers to work in the production unit (R. 5a; 522a). On May 28, the Company informed the Union that it had decided to give both replacements and strikers who returned to work during the strike 20 years additional seniority, which would be used only for future layoffs and would not affect vacations or any other employee benefits based on years of service (R. 5a, 120a, 211a, 565a).[7] At a union meeting on May 29, the strikers unanimously resolved to continue striking "until management stops its unfair labor practice by making us agree to * * * super-seniority [for] the scabs" (R. 6a; 274a). That weekend, May 30 and 31, the Union publicized the Company's 20-year superseniority plan over the local television station (R. 6a; 173a).

By the end of the first week in June, the Company had hired a total of 57 replacements and reinstated 8 returning strikers (R. 522a). During that same week, the Company and Union reached agreement on several seniority provisions which had been in dispute, but superseniority remained in issue (R. 6a; 126a-127a). On June 10, the Company wrote a letter to all employees and members of the Union, making its first announcement to them of the 20-year superseniority plan (R. 6a; 130a-131a). Although the Union offered to give up union security if the Company would abandon superseniority or go to arbitration on the question, and threatened to continue striking if it did not, the Com-

[7] The Company did not publicize this plan until June 10, terming it "confidential" until that date (R. 6a; 344a).

pany position remained firm and no agreement was reached (R. 6a; 332a-333a).

By June 14, 81 replacements (47 employees recalled from layoff status and 34 new employees) and 23 returning strikers had accepted production unit jobs (R. 7a; 394a-395a, 522a). On June 15, the Company posted the 20-year superseniority plan on its bulletin board (R. 7a; 122a). In the following week, 64 strikers returned to work and 21 replacements took jobs in the unit, bringing the total number of replacements to 102 and returned strikers to 87 (R. 7a; 394a-395a, 522a). When the number of returned strikers went up to 125 in the week beginning June 22, the Union decided it had to settle the strike. It offered to withdraw the picket line and submit the superseniority issue to the Board, and the parties drew up a tentative agreement on the remaining economic issues (R. 7a; 212a-214a, 522a). Although the Company notified the Union on the evening of June 24 that it would not accept the terms of the tentative agreement, the Union, on June 25, nonetheless called an end to the strike and requested reinstatement for the strikers (R. 7a; 43a, 166a, 212a-216a, 567a).

The next day the Company gave the Union a list of 129 strikers whom the Company would not reinstate because their jobs had been filled by replacements (R. 7a; 228a-229a).[8] In the next few weeks following the strike's termination, the Union received approximately 173 resignations from membership (R. 16a; 260a-263a).

[8] The Company had received approximately 300 job applications which had not yet been processed at the strike's end (R. 6a; 392a-393a).

On July 17, 1959, the parties executed a settlement agreement, providing that the propriety of the "Company's replacement and job assurance policy" should be "resolved by the NLRB and the Federal Courts" and should "remain in effect pending final disposition" (R. 7a-8a; 578a). The Company and Union also executed a new contract on this date, including among other things a provision requiring maintenance of membership for those employees remaining in the Union on August 17, 1959 (R. 8a; 316a, 580a).

Following the strike's termination, the Company began to reinstate those strikers who had not been replaced, recalling them on the basis of seniority, with several exceptions not in issue here (R. 7a; 411a-412a). In September 1959, the Company's production unit work force reached a high of 442 employees (R. 7a; 399a-400a, 523a). Economic layoffs in succeeding months, however, gradually reduced the work force to 240 by May 1960 (R. 7a; 399a-400a, 524a). A large number of employees laid off during this cut-back period were reinstated strikers whose seniority concededly became insufficient to retain employment solely as a result of the Company's super-seniority policy (R. 7a; 176a).

II. The Board's Conclusions and Order

On the foregoing facts, the Board held that the Company's policy of granting 20 years superseniority for replacements and returning strikers violated Section 8(a)(3) and (1) of the Act, irrespective of the Com-

party's possible economic justification therefor (R. 18a-19a).[9] In the Board's view, since the policy discriminated against employees solely on the basis of their strike activity, discouragement of that activity was "inescapable and demonstrable." Thus, as in *Gaynor News*,[10] where union membership was the basis of a wage disparity between employees, discrimination within the meaning of Section 8(a)(3) was established without a showing that the employer subjectively intended to discourage union activity. Nor, in the Board's view, was the discrimination privileged by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, "for superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by *Mackay*" (R. 11a). Having found that the superseniority arrangement violated Section 8(a)(3) of the Act, the Board further concluded that the Company refused to bargain, in violation of Section 8(a)(5), by insisting, as a condition to reaching a collective bargaining agreement with the Union, that the agreement contain a clause ratifying the Company's grant of superseniority (R. 20a-21a).

The Board, *inter alia*, ordered the Company to rescind its superseniority policy and to reinstate with backpay any recalled strikers laid off solely as a result of the policy;[11] to bargain with the Union upon request; and to post appropriate notices (R. 25a-26a).

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[9] The Board, therefore, declined to pass on the Company's contention that it was economically necessary to institute superseniority in order to obtain striker replacements (R. 19a, n. 29).

[10] This is one of the cases involved in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17.

[11] The Board also found that on May 29, when the Union voted

III. The Decision of the Court of Appeals

The court of appeals declined to enforce the Board's order, relying on the decisions of this Court in *Radio Officers* and *Mackay*, *supra*, and in *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667. The court below concluded that a preferential seniority policy could not be found to violate the Act absent a finding that the employer's "true purpose or real motive" was to discourage union activity rather than to keep its plant operating during the strike. The court stated (App., A, *infra*, p. 26):

> We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. * * *

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to continue striking until the Company stopped insisting on super-seniority, *supra*, p. 5, the strike became an unfair labor practice strike. Accordingly, the strikers not replaced by that date were unlawfully discriminated against when the Company denied their unconditional offer to return to work on June 25, 1959 (R. 20a-22a). To remedy this further discrimination, the Board ordered the Company to offer reinstatement to strikers who had not been replaced by May 29 and who offered to return on June 25, and to compensate such strikers for any loss in wages attributable to the June 25 refusal (R. 23a-24a).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that an employer may properly grant superseniority to replacements for strikers and returning strikers (and thereby reduce the relative seniority of those employees who elect to remain on strike), so long as he is motivated by a desire to keep his plant operating, and not to penalize the strikers, is in direct conflict with that of the Sixth Circuit in *Swarco Inc.* v. *National Labor Relations Board*, No. 14753, decided May 23, 1962 (set forth in Appendix D, *infra*, pp. 31-40). In *Swarco*, the Board, relying upon its decision in the instant case, concluded that an award of superseniority to returning strikers violated Section 8(a)(3) and (1) of the Act, irrespective of the employer's motive (133 NLRB No. 31). The Sixth Circuit affirmed the Board's decision, stating that, although "an employer has a right to keep his plant in operation during an economic strike, an honest motive alone for that purpose is not enough" to privilege discrimination, the natural consequence of which is to discourage strike activity (App. D, *infra*, p. 40).[12] This conflict of decisions requires resolution by this Court, particularly since, as we show *infra*, pp. 14-15, the question is a recurring one in the administration of the Act.[13]

[12] The decision below is in accord with that of the Ninth Circuit in *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82. There, the employer, at the conclusion of an economic strike, accorded superseniority to those who had worked during the strike; this caused several strikers, reinstated after the strike, to be laid off. The Board found the superseniority policy was discriminatory in violation of Section 8(a)(3) and (1) of the Act, 87 NLRB 1193. The Ninth Circuit, finding that there was an economic justification for the policy, declined to enforce the Board's order.

[13] On the basis of an asserted conflict with *Potlatch*, this Court

2. The decision below rests on an erroneous interpretation of decisions of this Court.

(a) The court below reads *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, and *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, as holding that discriminatory action does not violate Section 8(a)(3) of the Act, even though it tends to discourage or encourage union activity, absent specific proof that the action was motivated by such a consideration; and that if the discrimination is motivated by valid economic considerations (*e.g.*, the necessity to keep a plant in operation), there is no violation no matter how much union discouragement or encouragement flows from it. Those cases do not so hold; on the contrary, they support the Board's position. In *Radio Officers*, this Court pointed out that, although a purpose to encourage or discourage was necessary to establish a violation of Section 8(a)(3), such a purpose need not be specifically proved in every case. Where the discrimination is of a kind that encouragement or discouragement of union activity is a natural consequence, "an employer's protestation that he did not intend to encourage or discourage must be unavailing," for "it is presumed that he intended such

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granted certiorari in *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board*, 232 F. 2d 158, where the Fourth Circuit had sustained the Board's holding (114 NLRB 486) that the grant of superseniority to replacements and returning strikers violated Section 8(a)(3) and (1) of the Act. However, when it subsequently appeared that the holding in *Olin Mathieson* rested on a finding that the grant of superseniority was motivated by a desire to penalize the strikers and not by economic considerations, the decision of the Fourth Circuit was affirmed *per curiam*, without reaching the issue presented here. 352 U.S. 1020.

consequence" (347 U.S. at 44-45). The Court expressed the same view in *Local 357*, stating that, although it is "the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" of whether there is a violation of Section 8(a)(3), some "conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference" (365 U.S. at 675).

Gaynor News, which was one of three cases disposed of in the *Radio Officers* opinion, illustrates this principle. There the Company granted retroactive wage increases to employees who were members of the union and declined to give such benefits to other employees in the same bargaining unit because they were not union members. The Company did not intend, by this disparate action, to encourage union membership, nor was it otherwise illegally motivated. It "refused to make similar payments to any of its nonunion employees on the grounds that it was not contractually bound to do so,[14] and, in its business judgment, did not choose to do so" (347 U.S. at 35-36).[15] Nevertheless, this Court sustained the Board's finding that the Company's action constituted discrimination in violation of Section 8(a)(3) of the Act, for "a natural consequence of discrimination, based solely on union membership * * * is * * * encouragement of membership in such union" (347 U.S. at 46).

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[14] The union had, by contract, obtained the wage increases for its members only.

[15] The Court added that the Board "concedes that the employer acted from self-interest and not to encourage unionism" (347 U.S. at 37).

The situation here is similar to that in *Gaynor*. Here, as there, union considerations were the basis for treating employees differently; *i.e.*, the employees here suffered a reduction in relative seniority solely because they elected to remain out on strike in support of the Union's bargaining demands. The natural consequence of discriminating among employees on the basis of whether they continued to support the strike called by their bargaining representative is to discourage union membership and activity.[16] Accordingly, irrespective of subjective good faith or possible economic justification, the Company's superseniority policy violated Section 8(a)(3) of the Act.[17]

(b) The reliance of the court below on *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, is misplaced. That case holds that, in an economic strike, an accommodation must be made between the right to strike and the employer's legiti-

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[16] The Board found that this was the result here. It noted that following the strike there were some 173 resignations from the Union, and stated, "It is hard to conceive of continued effective collective bargaining under these circumstances" (R. 16a; 260a-263a).

[17] In the concurring opinion in *Local 357*, 365 U.S. 667, 677, 680-681, relied upon by the court below (App. A, *infra*, pp. 22-23), two members of the Court suggested that the only time when proof of an intent to encourage or discourage union membership can be dispensed with is when there is no "significant business justification" for the employer's acts. Although *Gaynor* is an exception to this principle, it was explained on the further ground that the employer "was prevented from asserting the justifying business reasons for thus encouraging union membership because of his complicity in the union's breach of its duties as agent for *all* the employees" (*id.* at 681). We submit that the rationale set forth in the concurring opinion does not fully accord with the principles enunciated in *Radio Officers'* and reemphasized in the opinion for the Court in *Local 357*; nor is there any suggestion in the Court's opinion in *Gaynor* that it rests on the narrow ground advanced by the concurring Justices.

mate interest in running his business. Therefore, the employer may, without violating the Act, obtain permanent replacements for the strikers. This limited privilege, however, does not sanction a grant of superseniority to replacements and strikers who abandon the strike. Such a policy affects all strikers, whether replaced or not, and its impact continues long after the strike has ended. It divides the labor force into two groups—those whose jobs are less secure because they remained loyal to the strike and those whose job security has been enhanced because they returned to work before the strike was over (see R. 1a-16a). As the Sixth Circuit recognized in *Swarco* (App. D, *infra*, pp. 34-35), nothing in *Mackay* permits a policy which results in such discrimination.

3. The question whether an employer may, without violating Section 8(a)(3) of the Act, reduce the seniority status of employees who elect to remain on an economic strike has been a problem of increasing importance in the administration of the Act.[18] It has evoked

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[18] See *Potlach Forests Inc.*, 87 NLRB 1193 (1949), enforcement denied, 189 F. 2d 82 (C.A. 9); *Olin Mathieson Chemical Corp.*, 114 NLRB 486 (1955), enforced, 232 F. 2d. 158 (C.A. 4), affirmed, 352 U.S. 1029; *California Date Growers Ass'n*, 118 NLRB 246 (1957), enforced, 259 F. 2d 587 (C.A. 9); *Ballas Egg Products*, 125 NLRB 342 (1959), enforced, 283 F. 2d 871 (C.A. 6); *Swan Rubber Co.*, 133 NLRB No. 31 (1961), enforced, May 23, 1962, 50 LRRM 2262, Docket No. 14753 (C.A. 6); *Griffin Pipe Division of Griffin Wheel Co.*, 136 NLRB No. 144 (1962), pending on petition to review (C.A. 7). Cf. *United Shoe Machinery Corp.*, 96 NLRB 1309, 1313-1314 (1951); *Lewin-Mathes Co.*, 126 NLRB 936, 939, 951 (1960), enforcement denied, 285 F. 2d 329, 333 (C.A. 7). See also, *Paper, Calmenson and Co.*, 26 NLRB 553, 557 (1940); *Precision Castings Company*, 48 NLRB 870, 879-881 (1943); *Indiana Desk Co.*, 56 NLRB 76, 78-79 (1944); *General Electric Company*, 80, NLRB 510, 512 (1948).

wide interest and comment.[19] A resolution of the problem by this Court will remove the uncertainty which has arisen as to the propriety of this technique, and also enable the Court further to clarify the meaning and scope of its decisions in *Radio Officers', Local 357*, and *Mackay*.[20]

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[19] See, *e.g.*, Comment, *Strike Superseniority: Valid Extension of NLRB* v. *Mackay Radio and Telegraph or Violation of Section 8(a)(3) of the NLRA?*, 27 U. of Chi. L. Rev. 368 (1960); Comment, *Legal and Practical Limitations Upon an Employer's Right to Replace Economic Strikers: Herein of Superseniority Plans*, 52 N.W.U. L. Rev. 122 (1957); Note, 70 Harv. L. Rev. 737 (1957); Note, 42 Va. L. Rev. 836 (1956).

[20] In finding that "nothing in the Act * * * proscribes" (App. A, *infra*, p. 26) the Company's preferential seniority policy, the court of appeals also rejected, without discussion, the Board's holding that the Company's insistence on the policy as a condition of negotiating an agreement with the Union constituted a violation of Section 8(a)(5) of the Act (see Statement, *supra*, pp. 8-9, n. 11; R. 20). In the event this Court determines that the superseniority policy is an unlawful form of discrimination proscribed by Section 8(a)(3) and (1), the subsidiary ruling of the court of appeals with respect to the Board's finding of a Section 8(a)(5) violation should also be reversed. *National Labor Relations Board* v. *Wooster Division of Borg-Warner*, 356 U.S. 342.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13,700

ERIE RESISTOR CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions for Review and Cross-Petition to Enforce an Order of the National Labor Relations Board

Argued January 26, 1962

Before KALODNER, STALEY and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed May 15, 1962)

By SMITH, *Circuit Judge.*

This case is before the Court upon petitions for review filed by the Erie Resistor Corp. (the Company), and Local 613, I.U.E., AFL-CIO (the Union), and a cross-petition filed by the National Labor Relations Board (the Board) for the enforcement of its final

order. These petitions were filed under Sections 10(f) and (e) of the Labor Management Relations Act, 1947, 29 U.S.C.A. 160(f) and (e). The essential facts are not in dispute and the jurisdiction of this Court is conceded.

Facts

The Company maintained a manufacturing plant at Erie, Pennsylvania, where it was engaged in the manufacture and sale of electronic components, electromechanical assemblies, and custom molded plastics. The production and maintenance workers of the Company were, and had been since 1951, represented by the Union. There had been in force and effect successive collective bargaining agreements, the last of which was terminated on March 31, 1959.

Approximately two months prior to the termination of the then existing agreement, the Union notified the Company of its desire to enter into negotiations in anticipation of a new contract. The negotiators for the respective parties met from time to time thereafter but were unable to reach full agreement. When the existing agreement terminated on March 31, 1959, a strike was called. It is here admitted that at its inception the strike was economic. When the strike was called there were 478 production and maintenance workers actively employed and 450 on layoff status; of those on layoff status, approximately 400 had no reasonable expectation of being recalled. All of the workers actively employed joined the strike.

The Company attempted to maintain production operations during the month of April by using clerical employees and other personnel outside the bargaining unit. Production declined to a level between 15% and 30% of normal, and several customers cancelled their orders with the Company. On May 3, 1959, each of

the strikers was notified by letter that the Company intended "to obtain replacements"; they were further notified that they would hold their positions only until replaced. The hiring of replacements commenced on May 11, and continued thereafter until June 24, 1959. The replacements included new employees, employees on layoff status, and returning strikers. When the applicants were accepted they were told that they would not be laid off or discharged by reason of the settlement of the strike.

When the negotiators met on May 11, 1959, the representatives of the Union were informed that replacements were being assured that they would not be discharged upon settlement of the strike. The Company, prompted by a desire to implement its assurances, proposed that the existing seniority system be so modified as to accord the replacements some form of preferential seniority. The Company offered to consider any plan acceptable to the Union, but the offer was rejected. The subject was discussed at five sessions held between May 11th and May 28th. The representatives of the Union remained adamant in their refusal to consider it on the ground that a preferential seniority system would be discriminatory and illegal.

On May 27, 1959, the Company formulated a preferential seniority plan under which twenty years were added to the regular length of service of all production and maintenance workers who accepted employment during the strike. The plan was limited in its application to future layoffs and recalls from layoff. The Union was informed of the plan on the following day and publicized it in radio and television broadcasts on May 30th and 31st. The strikers were informed by letter addressed to each of them by the Company on June 10th; copies of the plan were posted on the company bulletin boards on June 15th. Notwithstanding the for-

mulation of a preferential seniority policy, the Company expressed a willingness to consider any alternative plan proposed by the Union.

The strike ended on June 25, 1959, after the Union withdrew the picket line and offered to submit the seniority issue to the Board. Thereafter the strikers who had not been replaced were recalled by the Company in the order of seniority. By July 5th, 358 production and maintenance workers had returned to work; this number increased to 442 by September 20th. Thereafter, between September of 1959 and May of 1960, 202 employees were laid off for economic reasons; many of these were recalled strikers whose seniority was insufficient only because of the operation of the preferential seniority plan.

Decision and Order of the Board

The Trial Examiner concluded that under the applicable decisions a preferential seniority policy cannot be held illegal in the absence of proof that its adoption was prompted by a wrongful motive. He found that the evidence was "wholly inadequate" to support a factual determination that the adoption of the preferential seniority policy here in question was prompted by an illegal motive, and recommended dismissal of the complaint. The Board rejected the conclusion of the Trial Examiner and held "that superseniority HOWEVER MOTIVATED [is] an illegal discrimination against strikers."[1] (Emphasis by this Court).

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[1] This was admittedly the rationale of the Board in the Matter of POTLATCH FORESTS, INC., et al., 87 NLRB 1193 (1949). See Decision and Order of the Board, Joint Appendix 10a. This rationale was rejected, and enforcement of the Board's Order was denied by the Court of Appeals. N.L.R.B. v. POTLATCH FORESTS, 189 F.2d 82 (9th Cir. 1951).

The Board found: first, that the preferential seniority policy was inherently discriminatory and that its adoption was an unfair labor practice within the meaning of Sections 8(a)(3) and (1) of the Act, 28 U.S.C.A. 158(a)(3) and (1); second, that the layoff of recalled strikers was discriminatory and violated the said sections; third, that the Company's insistence upon a preferential seniority plan as a condition to settlement was tantamount to a refusal to bargain and an unfair labor practice within the meaning of Section 8(a)(5) of the Act, 28 U.S.C.A. 158(a)(5); and fourth, that the said conduct converted the strike into an unfair labor practice strike as of May 29, 1959, and, therefore, the refusal to reinstate all strikers upon termination of the strike was likewise a violation. The order directed the Company to cease and desist from the practices found to be illegal, and to take affirmative action consistent with the Board's decision.

Discussion

We concede that the application of a preferential seniority policy may be discriminatory and may tend to discourage union membership. The narrow question before us for decision is whether such a policy HOWEVER MOTIVATED is illegal.

An employer in the ordinary management of his affairs may be required to make business decisions discriminatory in their probable consequences. Such discrimination is not in and of itself illegal. The discrimination proscribed by Section 8(a)(3) as an unfair labor practice is that which is motivated by a desire "to encourage or discourage membership in a labor organization."

The Supreme Court has consistently held that the discriminatory conduct of an employer is not unlawful in the absence of an illegal motive. TEAMSTERS

LOCAL v. LABOR BOARD, 365 U.S. 667 (1961); RADIO OFFICERS v. LABOR BOARD, 347 U.S. 17 (1954); LABOR BOARD v. MACKAY CO., 304 U.S. 333 (1938); LABOR BOARD v. JONES & LAUGHLIN, 301 U.S. 1 (1937). The Court has adhered to the view that motivation is a relevant factor and the test of the employer's conduct. Ibid.

The case of TEAMSTERS LOCAL v. LABOR BOARD, supra, is pertinent. The matter came before the Board on a complaint which charged that an exclusive hiring agreement between an employer and a union violated Sections 8(a)(3) and (1). The agreement was held illegal on the ground that it inherently and unlawfully encouraged union membership.[2] The decision of the Board was sustained by the Court of Appeals.[3] The decision of the Court of Appeals was reversed by the Supreme Court. While the ultimate decision of the latter Court appears to rest on other grounds, the majority opinion reiterates that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." TEAMSTERS LOCAL v. LABOR BOARD, supra at page 675.

The relevance of motive as a determinative factor is discussed at length in the concurring opinion of Mr. Justice Harlan, with whom Mr. Justice Stewart concurred, 365 U.S. 667, 677-685. It is therein stated, at page 679:

> "What in my view is wrong with the Board's position in these cases is that A MERE SHOWING OF FORESEEABLE ENCOURAGEMENT OF UNION STATUS IS NOT A SUFFICIENT BASIS FOR A FINDING OF VIOLATION of the statute. It has long been recognized

[2] LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED, et al., 121 NLRB 1629 (1958); see also MOUNTAIN PACIFIC CHAPTER, etc., 119 NLRB 883 (1957).

[3] LOCAL 357, INTERNATIONAL BROTHERHOOD, etc. v. NLRB, 275 F.2d 646 (D.C. Cir. 1960).

that an employer can make reasonable business decisions, UNMOTIVATED BY AN INTENT TO DISCOURAGE UNION MEMBERSHIP OR PROTECTED CONCERTED ACTIVITIES, although the foreseeable effect of these decisions may be to discourage what the act protects." (Emphasis by this Court).

Mr. Justice Harlan went on to say, at page 680: "In general, this Court has assumed that a finding of a violation of § 8(a)(3) or § 8(b)(2) requires an affirmative showing of a MOTIVATION of encouraging or discouraging union status or activity."

We are of the opinion that RADIO OFFICERS v. LABOR BOARD, supra, lends support to our point of view.[4] We refer particularly to NLRB v. GAYNOR NEWS CO., 347 U.S. 17, 34. Therein the employer and the union were parties to an agreement under which the union was recognized as the exclusive bargaining agent for both union and non-union employees. Pursuant to the terms of a supplementary agreement, retroactive wage increases were granted to union employees but denied non-union employees; gratuitous vacation benefits were granted and denied on the same basis.

The matter came before the Board[5] on a complaint which charged the employer and the union with a violation of Sections 8(a)(3) and (1). The only answer offered by the employer was that the retroactive wage payments and gratuitous benefits had been paid under the compulsion of a legally binding contract. The Board concluded, as did the Trial Examiner, that the contract afforded no defense to the charge. We agree with this conclusion. The Board held that the disparate treatment of the employees on the basis of union

[4] Three cases were consolidated for hearing and disposition.

[5] GAYNOR NEWS CO. INC., et al., 93 NLRB 299 (1951).

membership foreseeably encouraged union membership and was therefore a violation of the pertinent sections under which the employer and the union were charged.

The view of the Board was sustained by the Supreme Court, which held that the evidentiary facts, absent proof of a valid business reason, were sufficient to support an inference that the disparate treatment of the employees was intended to encourage union membership. The Court said, at page 46: "No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job."

The Court held, at page 47, "that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating § 8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless 'to make agreements more favorable to the majority than to the minority.' Such discriminatory contracts are illegal and provide no defense to an action under § 8(a)(3)."

The Supreme Court held: "that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3)," [6] but

[6] We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary.

it did not disregard motivation as a relevant factor. The Court said:

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, LABOR BOARD v. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' ID., at 46. In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.'" RADIO OFFICERS v. LABOR BOARD, supra, at page 43.

It was established by LABOR BOARD v. MACKAY, supra, that an employer, TO PROTECT AND CONTINUE HIS BUSINESS, may replace strikers during the strike and assure the replacements that their employment will not be terminated upon settlement of the strike. Such a replacement policy is obviously discriminatory and may tend to discourage union membership. The presence of these factors in and of themselves do not render the policy illegal. The test of its legality is the true purpose, or real motive, of the employer. This was clearly the test applied by the Court in the cited case. Ibid. The rationale of the MACKAY case is pertinent in the instant case.

We direct our attention to NLRB v. CALIFORNIA DATE GROW. ASS'N., 259 F.2d 587 (9th Cir. 1958), and OLIN MATHIESON CHEM. CORP. v. NLRB, 232 F.2d 159 (4th

Cir. 1956). The question before the Court in these cases was the legality of a preferential seniority policy. It was found in each case that there was no evidence that the policy was adopted to protect and continue the business. The respective Courts decided that the policies were motivated by a desire to discourage union activities. It should be noted that both Courts applied the test of real motive. The decisions recognize that a preferential policy would be proper under appropriate circumstances.

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board.

The additional question raised in the petition for review filed by the Union is rendered moot by our decision; we therefore see no reason to discuss it.

The cross-petition for enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

DECREE

Before KALODNER, STALEY and SMITH, *Circuit Judges:*

THIS CAUSE came on to be heard upon the petitions of International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO and Erie Resistor Corporation to review and set aside a certain order of the National Labor Relations Board issued against Erie Resistor Corporation on July 31, 1961, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel January 26, 1962, and has considered the briefs and the transcript of record filed in this cause. On May 15, 1962, the Court, being fully advised in the premises, handed down its decision denying enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated July 31, 1961, directed against Erie Resistor Corporation, its officers, agents, successors and assigns, be and it hereby is denied.

A TRUE COPY

IDA O. CRESKOFF,
Clerk.

BY THE COURT,
WILLIAM F. SMITH,
Circuit Judge.

DATED: June 26, 1962.

APPENDIX C

The National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 151, *et seq.*) provides in pertinent part:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair

labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

APPENDIX D

No. 14753

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* SWARCO, INC. (Swan Rubber Company Division of Amerace Corporation), PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petition to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board.

Decided May 23, 1962

Before: CECIL and WEICK, *Circuit Judges*, and STARR, Senior *District Judge*.

CECIL, Circuit Judge. This case is before the Court upon the petition of Swarco, Inc., to review and set aside an order of the National Labor Relations Board issued against it on September 26, 1961. The National Labor Relations Board hereinafter called the Board, Respondent, filed an answer in which it requested enforcement of its order. (133 N.L.R.B. No. 31.)

The matter was submitted to the Trial Examiner upon a stipulation of facts and the oral testimony of four witnesses. The facts may be briefly summarized as follows:

The petitioning employer at the time this cause of action arose operated two plants, one in Bucyrus, Ohio, and one in Carey, Ohio. Local 267 of the Rubber Workers Union had represented the employers at

* 8-CA-2195; 133 NLRB No. 31.

Bucyrus since 1957. The employees at Carey had been represented by Local 414 of the Rubber Workers Union since 1950. There were separate bargaining units for the two plants whose contracts expired about May 1, 1960. Negotiations which had begun in March broke down over issues of union shop, checkoff and arbitration. On Sunday, May 8, 1960, the two locals struck their respective plants.

The petitioner at Bucyrus was [illegible] exclusive producer of special hose products for an automotive manufacturer and other companies and it being in the height of the season, the employer was concerned over the possibility of losing these accounts. The petitioner decided to open the Bucyrus plant immediately. Accordingly, the plant was opened on May 9th and on the first day of opening a substantial number of employees crossed the picket line and went to work. The reporting employees were told that they could have any available job for which they were competent and that they would be protected against bumping or future layoffs, regardless of previous seniority, as against striking employees who did not return to work before the end of the strike. This preferred seniority was to be applicable to these employees only so long as they remained on the jobs which they chose at the time. The non-striking employees were told to inform the strikers of the employer's promise of superseniority, if they returned to work. Supervisors of the petitioner visited the picket line, in person, and informed the strikers of the offer of superseniority and job transfer.

Additional employees abandoned the strike and returned to work at the Bucyrus plant within the next four days. No new replacements were hired and Local 267 called off the strike a week after it began. Subsequently, in the course of economic layoffs, approximately nineteen of the former strikers were laid off

solely because of their reduced seniority under the plan adopted by the employer during the strike. These laid-off employees are the subject of the Board order now before us.

At the time of the strike, the Carey plant had built up a substantial surplus of manufactured products and the employer made no effort to operate that plant until June 2, 1960. On that date the petitioner sent a letter to the Carey employees and offered to them the same superseniority and choice of jobs that was offered to the employees at the Bucyrus plant. This offer was repeated in another letter dated July 8th.

Approximately seventy-five employees returned to work. In addition one hundred seven new employees were hired during the strike. The superseniority offer did not apply to the new replacements. In subsequent negotiations Carey, Local 414, agreed to accept the superseniority policy until June 1, 1961, if the returned strikers who were the beneficiaries of this policy would agree to go back to their old jobs. The returned strikers rejected this by secret ballot on July 16th. The strike was called off on July 23rd. One employee at Carey was laid off on September 19, 1960, solely as a result of his reduced seniority under the respondent's plan. Subsequent to the end of the strike, the union at Bucyrus was decertified by a vote of the employees. In August, 1960, a decertification petition was filed, by certain employees, on the Carey plant. This matter is still pending.

The amended complaint charged that the petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act (Section 158(a)(1)(3), Title 29 U.S.C.) by offering and granting superseniority to the strikers at its two plants, if they abandoned the strike and returned to work.

The Trial Examiner, in his intermediate report, recommended that the complaints be dismissed. He found that the strike was an economic one and that the employer was motivated by a sincere desire to keep its plants in operation and not to punish the strikers and that its conduct was based on legitimate economic reasons and, therefore, not violative of the Labor Act. In support of this conclusion he relied on *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, C.A. 9.

The general counsel filed exceptions to the intermediate report and the case was reviewed by the Board. The Board reversed the Trial Examiner and found that the petitioner violated sections 8(a)(1) and (3) of the Act by offering and granting superseniority to strikers at its Bucyrus and Carey plants. The Board further found that the petitioner violated these sections by laying off a number of recalled strikers solely as a result of their reduced seniority under the superseniority plan. The Board relied on *Erie Resistor Corporation*, 132 N.L.R.B. No. 51, in support of its conclusion. This case is now pending on appeal in the Third Circuit.

It is conceded that under the doctrine of *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345, the employer could have hired new employees as replacements of its regular employees, in order to keep its plant in operation and that it would not have to discharge these replacements after the strike, in order to put the strikers back to work. It is argued on behalf of the employer that if new employees could be hired, as replacements, there is no reason why its own employees could not be put to work as replacements for the strikers.

In reversing the Trial Examiner, the Board did not find that he erred in his findings of fact that the employer did not act to punish the strikers or that it was motivated by a sincere desire to keep its plant in operation in the face of an economic strike. The Board based

its reversal on the Erie Resistor case, supra. In that case, the Board held that the granting of superseniority to strikers and strike replacements, in order to induce them to abandon a strike and return to work, was a form of discrimination beyond the purview of an employer's right to replace economic strikers as sanctioned by the Mackay Radio case.

The facts of this case do not bring it within the ambit of the *Mackay* case. The question posed here is whether, under the facts of this case, the granting of superseniority is a violation of sections 8(a)(1) and (3) of the Labor Act. (Section 158(a)(1)(3), Title 29 U.S.C.)

We do not consider that *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, C. A. 9, is dispositive of the case at bar. In *Potlatch*, the union and the employer disagreed over wage differentials in renewing their contract and the union called a strike in August 1947. Near the end of August, the employer was able to resume operations by gradually accumulating both new employees and old employees who crossed the picket line. When the strike was later terminated, the replacements numbered about 1750 out of a normal complement in the bargaining unit of 2600.

The strike being hopelessly lost, the union began negotiations to settle it on October 10, 1947. In the course of these negotiations, the employer vigorously contended for protection of job security of the replacements as against those who would return upon the termination of the strike. The union as vigorously maintained that the seniority rights of the strikers should be preserved. The strike was settled on October 13th and immediately the employer drafted, in writing, the strike seniority policy which gave rise to the action of the Board. The essence of this policy was that the employees who came to work after October 13th were to be laid off ahead of those replacements who were

working before that date, in the event a reduction in force should become necessary.

Potlatch maintained this seniority policy without deviation and on February 18, 1949, the International Woodworkers of America, Local 10-364, filed charges against the employer of violation of section 8(a)(1) and (3) of the Act. The Board found a violation of this section 8(a)(3), on the basis that it provides, "that 'it' shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * " (p. 84).

The court for the Ninth Circuit considered that the sole question for determination was whether the acts charged constituted discrimination under section 8(a)(3) of the Act. A simple "economic strike" being involved, an unfair labor practice could not be sustained unless it was found that the maintenance of the seniority policy was in and of itself an unfair labor practice. (p. 85)

The court found that there was no discrimination between union and non-union members on the basis of union membership. The only discrimination charged was between the replacements, some of whom were strikers returned to work before the strike ended, and the strikers who returned to work after the termination of the strike.

The court held "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific ques-

tion posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers." p. 86.

The record does not disclose that the employer promised or assured the replacements that their jobs would be permanent at the time they were employed. Neither is it shown that the employer promised seniority to the employees in order to get them to return to work and abandon the strike.

In *Olin Mathieson Chemical Corporation* v. *N.L.R.B.*, 232 F. 2d 158, C. A. 4, affirmed 352 U. S. 1020, the Board found in agreement with the Trial Examiner that the employer changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end. The court found on the facts that the employer "was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future." p. 161. The Board's order was enforced.

In *N.L.R.B.* v. *California Date Growers Association*, 259 F. 2d 587, C. A. 9, the court held that there was substantial evidence in the record as a whole to support the Board's finding that the employer "revised its seniority list, * * * not to implement its assurances to the nonstrikers but rather for the purpose of punishing employees who struck against it, and to discourage by this means further activity by those strikers or other

employees in behalf of the Union." See also *Ballas Egg Products, Inc.* v. *N.L.R.B.*, 283 F. 2d 871, C. A. 6. *N.L.R.B.* v. *Lewin-Mathis Co.*, 285 F. 2d 329, C. A. 7, is another case involving superseniority granted to replacements as against strikers in an economic strike. *In this case, the replacements were taken from a non-striking unit of the employer's plant.* At their request, they were granted superseniority against returning strikers, as a condition to accepting the employment. The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, at 345, 346.

From a review of these cases involving superseniority, we find that the question of violation of section 8(a)(1) and (3) of the Act, by reason of granting such superseniority, is a question of fact. Each case must be decided on its own particular facts.

Section 8(a)(3) of the Act, so far as it is pertinent to this case, provides, in part, "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." If this section is violated, it follows that (a)(1) is also violated. This section makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157, Title 29 U.S.C.) of this title." Section 7 gives employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the case of an economic strike there is no restraint on the employer communicating with the employees. This is protected by the first Amendment to the Consti-

tution. *N.L.R.B.* v. *Virginia Electric and Power Co.*, 314 U. S. 469; *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 153, C. A. 7.

In the Bradley case, the court said: "The mandate of the statute is that the employer shall not interfere with or coerce the employees in the exercise of their right to organize and bargain collectively. However, *absent a showing of interference or coercion, or a threat of reprisal or promise of benefit*, in such situations, the employer is free to say to his employees that he wishes to carry on production and, that, if the employees desire so to do, they may return to work.

"* * * In situations such as the one before us, we think the employer may communicate directly to his striking employees the working conditions he is willing to extend to them; and that, if in the exercise of free choice, the employees return to work, no charge of misconduct may properly be levied against him. *If the communications are fair in their description of the situation and they do not offer the returning employees greater benefits than will be extended to those remaining on strike, they do not support a finding of unfair labor practices.*" (Emphasis added.) See also *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 236 F. 2d 898, 905, C. A. 6, affirmed in part and reversed in part, 356 U. S. 342.

In the case at bar, the employer offered the first employees at Bucyrus who voluntarily crossed the picket line superseniority over the employees who remained on strike. It instructed them to carry this word and offer to other employees and it sent supervisors out on the picket line to offer the same inducement to the strikers.

The employer made the same offer to employees at Carey, when it was ready to open that plant. It did this by letter on two separate occasions.

The granting of superseniority to employees who gave up the strike and returned to work was a benefit to them which was not granted to those who remained on strike. It constituted an inducement to give up the strike and a threat of reprisal to those who continued on strike. It was not an easy choice to make—an immediate benefit as against a possible future benefit, if the strike succeeded. To a factory worker, seniority against being laid off, when a reduction in force is necessary, is a very valuable right. The importance of seniority as a tool in the hands of the employer is discussed in the *Erie Resistor* case, *supra*.

Although it is conceded that an employer has a right to keep his plant in operation during an economic strike, an honest motive alone for that purpose is not enough. In *Radio Officers' Union of Commercial Telegraphers Union* v. *N.L.R.B.*, 347 U. S. 17, 45, the court said: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

We conclude that, under the facts of this case, the conduct of the petitioner in urging the strikers to come back to work on the promise of granting those who abandoned the strike and returned to work seniority over those who remained on strike constituted discrimination which did, in fact, discourage membership in the union. Such discrimination interfered with the employees' right to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

Consequently, we find that the petitioner violated sections 8(a)(1) and (3) of the Act and an order of enforcement is decreed.

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